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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	Finlay et al.	Examiner:	Anh Ly
Serial No.	09/628,599	Group Art Unit:	2172
Filed:	July 28, 2000	Docket No.	CA990018US1
Title:	DIRECT CALL THREADED CODE		

CERTIFICATE UNDER 37 CFR 1.6(d)
I hereby certify that this correspondence is being transmitted, via facsimile only, to Facsimile No. 571/273-8300 on June 5, 2007.

Sandra Parker

PETITION TO DIRECTOR UNDER 37 CFR 1.181, 1.182 AND 1.183

Attention: Office of Petitions
Mail Stop Petitions
Commissioner for Patents
P.O. BOX 1450
Alexandria, VA 22313-1450

Sir:

Please accept this Petition which concerns a twice appealed patent application where the transfer to the Appeal Board was never allowed but the prosecution was reopened without the filing of an Examiner's Answer, after the Applicant filed the Appeal Brief. It is mailed within the statutory two month period, after the last reopening Office Action dated 4/6/2007. The Petition respectfully requests a review under one of the three available methods: a) under 37 CFR 1.181, b) under 37 CFR 1.182, or, if necessary, c) under 37 CFR 1.183, which are all petitioned and argued herein in the alternative.

06/07/2007 NNGUYEN1 00000003 090460 09628599
01 FC:1462 400.00 DA

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Applicant respectfully requests one of the proposed two actions: 1. to vacate/withdraw the Office Action dated 4/6/2007 and allow the application or submit the application to another examiner, or 2. to reinstate the appeal and Appeal Brief dated 1/3/2007 and revoke the approval for reopening of the prosecution.

Applicant respectfully requests that the Petition fee in the amount of $400 be charged to the IBM deposit account No. 09-0460, and any overpayment be credited to the same account.

STATEMENT OF FACTS

Prosecution of this patent application has now been going on for almost seven full years. There were four searches performed and total of 35 references found by the examiner. There were six office actions, one RCE filed and two Appeal Briefs. Each time after the Appeal Brief the examiner withdrew all his rejections and performed a new search, never necessitated by the Applicant's Brief. Thus, the Examiner never allowed this application to get in front of the Appeal Board. Furthermore, he never wrote an Examiner's Brief and apparently never conducted any appeal conferences with other examiners. Moreover, this application is not in PAIR so there is no possibility to the Applicant or public to review the file online.

After the first Office Action of 10/31/2002, a final Office Action was issued on 4/1/03. Because the Examiner would not allow an examiner's interview or propose an amendment, he suggested filing an RCE. New Office Action of 11/10/03 had a new search report citing all new prior art of 7 references. No interview was granted and a final Office Action issued on 4/2/04. Appeal Brief was filed on 9/8/04 and almost 18 months later, without any response from the examiner, the prosecution was reopened on 2/7/06, with a new search report and 13 all new references, citing an invalid CFR code.

After numerous Applicant's phone calls and e-mails to examiner Ly, Supervisory Examiner John Breene, TC Director Jim Dwyer, an Office of Enforcement attorney, the Deputy Commissioner for Patent Examination Policy's employee William Korzuch and an MPEP Interpretation Specialist, two interviews were held. However, since the examiners were not certain about the

law and would not discuss the application, they advised the Applicant to file a Response to the Office Action, which was done on 5/7/2006.

A round of substantive phone conferences was held with the Primary Examiner Corrielus, around 7/19/06, who requested and proposed amendments implemented by the Applicant on 7/23/06 due to an agreement that this would cause an allowance. However, Examiner Corrielus was suddenly removed from the case and examiner Ly, who was present at the interviews later denied it and instead issued the final Office Action on 7/31/06. No new examiner's conference was allowed although new phone calls and e-mails were sent on 10/20/06 and 10/30/06, after promises by examiners Breene and Ly. They would not talk other than to state a need to file an Appeal with an Amendment as requested by examiner Corrielus, i.e., the Proposed Amendment of 7/23/2006.

After the Notice of Appeal and Amendment were filed, surprisingly, Examiner Ly again refused to enter this amendment. After the second Appeal Brief, no Examiner's Answer was filed but he again performed a new search finding 12 all new references and reopened the prosecution. Office Action dated 4/6/2007 is again full of errors, incomprehensible in many places, Summary page does not mark drawing deficiencies and specification objected to, the last page again has the old and wrong DC address for reply. However, for the first time since the filing of this application there is now also an unfounded 101 rejection, unfounded objections to drawings and specification, and many new improper rejections, mostly using as the prior art the applicant's own Background Section. The reopening of prosecution was not necessitated or provoked by the Applicant, as it was not provoked in the prior appeal.

A. PETITION UNDER 37 CFR 1.183 - REOPENING WAS UNJUST

37 CFR 1.183 authorizes the Director to allow Suspension of Rules in extraordinary situations, when justice requires that the rules be waived. Under the 35 USC 2.(b) (2) (C) the Director of the USPTO has the power that may establish regulations which facilitate and expedite the processing of patent applications. The Director and the Deputy Commissioner for Patent Examination Policy has authority on patent laws, rules and examining practice and procedure, establishes

examination policy standards, suspension of regulations, reviews of previous decisions by the Technology Centers, etc.

The reopening of the prosecution and a new search after an Appeal Brief filing is not authorized by any law or rule. 37 CFR Sec. 41.39 is very clear and it does not allow reopening of prosecution by an examiner after filing of an Appeal Brief but only allows it after the filing of the Examiner's Answer and subsequent Applicant's Reply Brief, as shown in Sec. 41.43. Rule 41.39 allows an examiner to include a new matter in the Examiner's Answer, but only gives the right to reopen prosecution to the Applicant, not to the examiner.

However, several sections of MPEP have some unclear and very vague language apparently allowing reopening of the prosecution when the examiner decides sua sponte that the "appeal should not go forward" (p. 1200-26), or "when necessary" (p. 1200-28). No CFR authority is sited because there is none in the 37 CFR 41.39 et al., Moreover, it gives a new name for Appellant's Brief "New Appeal Brief", unfound in the CFR, should s/he want to continue with the appeal. Further, it is not clear whether this brief has to address both the old and new rejections or can only keep arguments to the old rejections.

In order to expedite the prosecution, the law allows filing of an appeal immediately after the applications was twice rejected. Moreover, there is no rule in MPEP or CFR that allows a new search after reopening the prosecution after filing an Appeal Brief.

On the contrary, the MPEP Sec. 1207.03 explicitly states that it should not be a routine but rare to state new grounds of rejection in an Examiner's Answer and allows it when necessitated by applicant's amendment, new IDS or new arguments. Even then, no new search is allowed but the examiner can add a secondary reference from the prior art already on the record. Further, the MPEP Sec. 1207.5 clearly states that an examiner cannot issue a Supplemental Examiner's Answer, if no new issue was introduced by the applicant in the Reply Brief. Instead and only then, it allows an examiner to reopen the prosecution.

Specifically, the MPEP Sec. 1207 recites the authority of 37 CFR Sec. 41.39, which does not allow an examiner to reopen prosecution. However, in the next sentence this MPEP section approves, without citing any authority, for the examiner to reopen prosecution in order to enter a new ground of rejection. However, the cited CFR Sec. 41.39 clearly states that only an applicant can reopen the prosecution, if the examiner includes new grounds of rejection in an Examiner's Answer (p. 1200-26). Therefore, this section of MPEP is incorrect because, under Rule 41.39, the examiner can only file an Examiner's Answer. MPEP sections 1207.01 and 1207.02 are incorrect and only cite as authority the other equally defective MPEP sections, such as 1207.04 which is also defective because the CFR does not allow reopening after an Appeal Brief but only after a Reply Brief.

Further, the MPEP is not clear on whether this New Appeal Brief has to address both the old and new rejections or can only keep arguments to the old rejections. It states that an applicant must file a completely new brief but does not specifically states whether s/he must argue new grounds, old grounds or both. However, the MPEP Sec. 1208 for a Reply Brief clearly states that it must address each new grounds of rejection.

As it stands, and as it can be seen from the prosecution record of the present application, these MPEP sections do not preclude examiners from abusing the unlimited power given by these sections because there are no deadlines, no limits on number of reopenings, no need for a TC Director's signature, no appeal conferences needed and no checks by other examiners with sufficient experience to assist on merits. Furthermore, a withdrawal of previous rejections and reasons for reopening are not on record. Moreover, the examiner never has to argue an application on its merits and try to rebut applicant's arguments and his actions are not on review by the Appeal Board. He can indefinitely prolong the prosecution and introduce numerous rejections of doubtful value, conduct numerous searches in fishing expeditions and blanket inventors with worthless papers, while they have to pay exorbitant attorney's costs to respond to all the paperwork, and waste time and get a shorter patent duration. Moreover, since there is no limitation whatsoever in these MPEP rules, they can be used to hide ignorance, discrimination, even vendetta.

Therefore, since the 37 CFR Sec. 1.183 authorizes the Director to allow Suspension of Rules in extraordinary situations, when justice requires that the rules be waived, the applicant respectfully requests that the MPEP rules 1207 be waived and that the law, stated in 37 CFR 41.39 be applied to this application because all the circumstances warrant it.

Applicant respectfully requests one of the proposed two actions: 1. to vacate/withdraw the Office Action dated 4/6/2007 and allow the application or submit the application to another examiner, or 2. to reinstate the appeal and Appeal Brief dated 1/3/2007 and revoke the approval for reopening of the prosecution.

Should a review by an independent examiner be proscribed, the Applicant would gladly provide any explanation and would welcome any suggestions that would lead this application to issue.

Applicant also hopes that these above-mentioned MPEP sections will get a proper review, in light of the presented arguments and facts of this case, and be rewritten according to the authorization provided by the 37 CFR rules.

B. PETITION UNDER 37 CFR 1.181 OR 1.182 – TO INVOKE THE SUPERVISORY AUTHORITY

37 CFR Sec. 1.181 allows Petitions to the Director to invoke the supervisory authority over examiner's actions. In the alternative, the Petitioner/Applicant respectfully asks that the 37 CFR Sec. 1.182 be invoked if the questions are found in this petition which are not specifically provided for in Sec. 1.181.

In the prosecution of this application, many repeated actions by the examiner caused this application to be in the same spot as seven years ago, although it is the policy of the USPTO to expedite and advance prosecution to a final action. No examiner's interviews by examiner Ly to expedite prosecution were granted, no suggestions were given how to amend the application and numerous errors in facts and rules were committed.

Throughout the prosecution, Applicant noticed unusual and even egregious actions and errors in the examiner's practice which were documented in all responses to office actions and other documents. Specifically, the present patent application was never read as a whole, never understood and misinterpreted in each office action, as was the cited prior art. Each office action gave a different interpretation and has very vague and unclear wording. However, the examiner and supervisory examiner never allowed an examiner's interview on substantive grounds where the invention could be explained, although requested numerous times.

Furthermore, an appeal is allowed as a matter of right by law after the second rejection. However here there were six office actions, four different sets of prior art, and still the examiner would not allow this application to proceed to the Appeal Board for review. Moreover, after seven years of reviews of this application by the same examiner, for the first time a 101 rejection and drawings and specification objections were even mentioned, which may point out that the previous reviews were not thorough. However, these rejections and objections are as unsubstantiated as were the previous rejections, all of which had to be revoked by the examiner.

It is very clear by now that this examiner will not allow this patent application to ever be reviewed by the Appeal Board and a committee of his peers. He is routinely reopening the prosecution, never stating a reason, he never wrote an Examiner's Answer and there is no record that an appeal conference was held with other examiners. Nothing provoked an examiner's duty for a new search; there were no amendments, no new matter, no new arguments, no new evidence, no new IDS references. He never even responded to Applicant's arguments and could not rebut the arguments from the Appeal Briefs. He never stated a new ground of rejection using the prior art on record but conducted a new search. Reopening of prosecution was not necessitated or provoked by the applicant and the law does not proscribe or even mention that a new search is allowed after filing an Appeal Brief.

After four searches with 35 references, where all rejections were withdrawn each time an Appeal Brief was filed, it is clear that the rejections were obviously invalid. However, the examiner and his supervisor will not even talk about the application. They even requested a written authorization from the Applicant for the Applicant's attorney to conduct business via e-mails, but

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never responded to any e-mails when they got the authorization, although, as per MPEP 713.04, an e-mail conference is allowed and e-mails must be placed on file. Enclosed are copies of six e-mails to the examiners Breene, Corrielus and Ly, TC Director James Dwyer and William Korzuch, which should, by law, already be a part of the written record, which substantiate Applicant's diligence and requests for review and interview.

Applicant respectfully requests one of the proposed two actions: 1. to vacate/withdraw the Office Action dated 4/6/2007 and allow the application or submit the application to another examiner, or 2. to reinstate the appeal and Appeal Brief dated 1/3/2007 and revoke the approval for reopening of the prosecution.

Should a review by an independent examiner be proscribed, the Applicant would gladly provide any explanation and would welcome any suggestions that would lead this application to issue.

CONCLUSION

Petition Fee of $400.00 and any additional underpayment is authorized to be charged to Deposit Account Number **09-0460** in the name of IBM Corporation.

In view of the above, it is submitted that this application should now proceed to issue or to the Appeal Board, which applicant respectfully solicits. Should matters remain which could be resolved in a telephone interview, the Attorney is kindly requested to telephone the Applicant's undersigned attorney.

Respectfully submitted,

Date: June 6, 2007

Sandra M. Parker
Reg. No. 36,233

LAW OFFICE OF SANDRA M. PARKER
329 La Jolla Avenue
Long Beach, CA 90803
Phone/Fax: (562) 597-7504

Sandra Parker

From: "Sandra Parker" <sandramparker@charter.net>
To: "Breene, John" <John.Breene@USPTO.GOV>; "Ly, Anh" <Anh.Ly@USPTO.GOV>
Sent: Monday, October 30, 2006 9:16 AM
Subject: Fw: o9/628,599 URGENT!!

Dear Supervisory Examiner Breene,
as per my today's phone call with you and many e-mails, since the PTO wanted some kind of amendment in order to allow this application, and I do not know what is wanted, I would appreciate it if Examiner Ly would, with your help, propose an Examiner's Amendment that would satisfy the USPTO. I previously e-mailed two Proposed Amendments and a proposed Specification amendment which may be satisfactory or helpful.
Best regards,
Sandra Parker

----- Original Message -----
From: "Sandra Parker" <sandramparker@charter.net>
To: "Breene, John" <John.Breene@USPTO.GOV>; "Ly, Anh" <Anh.Ly@USPTO.GOV>
Sent: Monday, October 30, 2006 7:48 AM
Subject: o9/628,599 URGENT!!!

> Dear Examiners,
> I'm looking forward to your decision about the allowance of this patent
> application. I have not heard from you in a week regarding my proposed
> amendment and all the e-mails sent since June 2006.
> Because the final office action was sent on 7/31/06, I need your response
> today because the three month period for reply ends tomorrow.
> Best regards,
> Sandra Parker
>
>

Sandra Parker

From: "Sandra Parker" <sandramparker@charter.net>
To: "Breene, John" <John.Breene@USPTO.GOV>; "Ly, Anh" <Anh.Ly@USPTO.GOV>
Sent: Wednesday, November 01, 2006 7:49 AM
Attach: 18-amd-after-final-4.doc

Dear Examiners,
per your request I am sending you the Amendment After Final which was filed with the Notice of Appeal, for your review.
Best regards,
Sandra Parker

 2007

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Sandra Parker

From: "Sandra Parker" <sandramparker@charter.net>
To: <william.korzuch@uspto.gov>
Sent: Thursday, May 04, 2006 10:46 AM
Attach: ca990018us1_Office_Action.PDF
Subject: Fw: Pat. appl. 09/628,599 (our docket CA990018US1)

Dear Mr. Korzuch,

I hope that you can help me. Supervisory Examiner Breene may get back to me tomorrow and did not look at the new MPEP sections form my attached e-mail. Even if I get his response it may be late for the reply.

As you can see from the attached Office Action, old law 1.193 was cited, there is no 1207.4 (p.1200-39) form paragraph with the new CFR 41.31 and there is no statement that the SPE "has approved of reopening by signing below."

Moreover, a completely new search was done and new prior art is cited, instead of the prior art on the record.

Even if we file a new Reply Brief, it would be the first time to argue the new prior art. What is to stop the examiner from doing new searches forever? This has been going on for 6 years now. It is clear that the examiner would write the Examiner's Answer if he thought that he would win on Appeal so the application should be allowed now. Doing a new search after 6 years is very unfair and not prescribed by any 37 CFR appeal rules.

Furthermore, it is unfair that a patent attorney cannot get to talk to the Supervisory Examiner, Director or SPRE. When calling 2162 art unit number from PTO directory (571/272-2100) the voice mail loops and you cannot get anyone.

Please help me. In my opinion the improper Office Action should be revoked and Appeal should be reinstated. The PTO Directory states, under Petitions, that it is the role of the Director of the appropriate Tech. Center who I have no way of reaching).

Best Regards,
Sandra Parker
562/597-7504

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From: "Sandra Parker" <sandramparker@charter.net>
To: "Breene, John" <John.Breene@USPTO.GOV>; "Ly, Anh" <Anh.Ly@USPTO.GOV>
Cc: "Corrielus, Jean M." <Jean.Corrielus@USPTO.GOV>
Sent: Tuesday, May 02, 2006 1:05 PM
Subject: Pat. appl. 09/628,599 (our docket CA990018US1)

PAGE 11/15 * RCVD AT 6/5/2007 10:58:05 PM [Eastern Daylight Time] * SVR:USPTO-EFXRF-1/8 * DNIS:2738300 * CSID:5625977504 * DURATION (mm-ss):07-46

> Dear Examiners,
>
> I received an improper Office Action. I need your review and instructions
> asap,
> in order to file either a Response or a new Notice of Appeal, by 5/7/06.
>
> This patent application was filed almost 6 years ago and has been under
> Appeal since 2004. We already filed an RCE previously, in 2003, after a
> false Examiner's promise, but to no avail. Almost two years after the
> Appeal
> Brief was filed,
> the Examiner issued an improper Office Action and used a law which was
> repealed almost 2 years ago (37 CFR 1.193). Moreover, he improperly
> performed a
> new search and this time he cited 2 IBM patents, but did not state that
> there are new ground for rejection. Even the mailing address is very old,
> at
> Washington DC. Moreover, he did not state that he obtained Supervisor's
> approval for the reopening.
>
> I left phone messages for the Supervisory Examiner and Primary Examiner.
>
> Please note that the new law is 37 CFR 41.39 and in MPEP it is Sec. 1207
> (p.
> 1200-26), 1207.03 (p. 1200-35) and 1207.04 (p. 1200-39). Actually, the new
> CFR 41.39 does not allow the examiner to reopen prosecution so it is
> unclear
> which law was followed in MPEP 1207 and 1207.04. Further, p. 1200-35
> states
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> references were picked in a new search.
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> I propose to write a Response stating all the errors and request a
> substitute Office Action or Examiner's Brief and that a new law and ground
> of rejection is indicated as such and only using previously found prior
> art.
>
> Entering of the new prior art should not be allowed. Moreover, the
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> Please advise,
> Sandra Parker
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From: "Sandra Parker" <sandramparker@charter.net>
To: <james.dwyer@uspto.gov>
Sent: Thursday, May 04, 2006 12:29 PM
Attach: ca990018us1_Office_Action.PDF
Subject: Fw: Pat. appl. 09/628,599 (our docket CA990018US1)

Dear Mr. Dwyer,

I hope that you can help me. Supervisory Examiner Breene may get back to me tomorrow but he did not look at the new MPEP sections form my attached e-mail.
Even if I get his response it may be late for my Response by the due date 5/7/06.

As you can see from the attached Office Action, old law 1.193 was cited, there is no 1207.4 (p.1200-39) form paragraph with the new CFR 41.31, there is no statement that the SPE "has approved of reopening by signing below [4]" and there are other numerous improprieties. Moreover, a completely
new search was done and new prior art was cited, instead of the prior art on the record.
Furthermore, as can be seen in the OA regarding claim 1, on pp. 4-5, it was rejected
under Sec. 102, however there is no mentioning of the "direct call mechanism replacing a lookup function",
which is the jist of the present invention, as seen in the Title, claims and elsewhere,
so this new rejection is frivolous, as were the two previous rejections.

Even if we file a new Reply Brief, it would be the first time to argue the new prior art and the Examiner may again reopen the prosecution with a new search.
What is to stop the examiner from doing new searches forever?
This cannot possibly be the policy, now that the patent term is calculated from the date of filing.

This kind of "prosecution" has been going on for 6 years now in this case.
It is clear that the examiner would have written the Examiner's Answer if he thought that he would win on Appeal so the application should be allowed now.
Doing a new search after 6 years is very unfair and there is no authority for it in any 37 CFR appeal rules.

Furthermore, it is unfair that a patent attorney cannot get to talk to the Supervisory Examiner, Director or SPRE. When calling the 2162 art unit number,
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Please help me. In my legal opinion the improper Office Action should be revoked
and the Appeal should be reinstated. The PTO Directory states, under Petitions,
that it is the role of the Director of the appropriate Tech. Center.

Because that is your function, please review and advise asap.

Best Regards,
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Cc: "Corrielus, Jean M." <Jean.Corrielus@USPTO.GOV>
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